New Brunswick General Sheet Metal Works *and* Sheet Metal Workers International Association, Local Union 27. Cases 22–CA–19959 and 22–CA–20215

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

The major issues presented in this case[1] are (1) whether the Union established itself as an exclusive bargaining representative pursuant to Section 9(a) of the Act; (2) whether the Respondent violated Section 8(a)(5) by insisting on the presence of counsel in negotiations, by withdrawing recognition from the Union, and by unilaterally implementing new terms of employment; (3) whether a strike by employees was an unfair labor practice strike; and (4) whether the Respondent violated Section 8(a)(3) by failing promptly to reinstate the strikers after they unconditionally offered to return to work and by offering the strikers reinstatement at terms which had been implemented unilaterally.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The Respondent and the Union entered into a contractual relationship in 1991. The 1991 contract was due to expire on May 31, 1994.[3] On March 30, the Union and the Respondent, which had withdrawn from the signatory multiemployer association, met and exchanged proposals for a successor agreement. According to credited testimony, the Union thereafter suspended contract talks pending multi-employer negotiations.

The next contact between the parties was a May 26 request by Union Business Representative Kohler for negotiations on May 27. Respondent's President Grywalski phoned Kohler and told him that a scheduling conflict precluded this meeting. In their conversation, Kohler stated that Union President Stapleton would accompany him at the next meeting. Kohler suggested that Grywalski also "bring somebody with [him]." Grywalski said that he would bring his attorney, John Craner. Kohler replied "no labor attorney."

Kohler and Grywalski spoke again just prior to the scheduled May 31 bargaining session. When Grywalski confirmed his intent to bring Craner, Kohler again responded "no labor attorney" and said that "we wouldn't meet" if Grywalski brought his attorney. The parties did not meet on May 31.

In correspondence between the parties on June 6–8, the Respondent reviewed its contract proposals and repeated its willingness to meet for negotiations. The Union repeated its refusal to meet if Craner was present on the Respondent's behalf, stated that negotiations were deadlocked, and indicated that it would file for interest arbitration under the expired contract. The Respondent's letters, proceeding on the mistaken view that the parties had a Section 8(f) relationship that could be repudiated upon expiration of the contract, also declared that "there is no longer a collective-bargaining relationship in existence."

Soon thereafter, the Union did file for interest arbitration. The Respondent refused to participate. On June 17, Grywalski met with Kohler and Shop Steward Previte and handed them copies of the aforementioned correspondence. Grywalski stated that he would implement the Respondent's contract proposals on June 20 in light of the parties' bargaining deadlock. Previte and Kohler requested that Grywalski forestall implementation until the interest arbitration panel ruled, but Grywalski refused stating that he "no longer consider[ed him]self in the union." Previte, without objection by Kohler, then suggested that the Grywalski gather the employees and inform them of his plans.

The meeting was held later in the day. Previte attended. Grywalski distributed copies of the June 6–8 correspondence and announced his intention to implement the Respondent's contract proposals on June 20. On that date, the employees commenced a strike.

On September 12, the Union made an "unconditional application to return to work" on behalf of all striking unit employees. The Respondent did not reply. The Union sent a second letter on September 20. The Respondent again did not answer. Finally, on January 25, 1995, the Respondent sent one of the eight strikers a letter offering him reinstatement on the basis of unilaterally implemented terms. It sent similar reinstatement letters to five other strikers on April 11, 1995.

The judge dismissed the allegation that the Respondent violated Section 8(a)(5) by failing to bargain with the Union and by unilaterally implementing its proposals. He noted that the parties had exchanged proposals at their initial March 30 meeting and at no time thereafter did the Respondent state that it refused to meet with the Union. The judge found that the Union's refusal, since May 27, to negotiate in the presence of the Respondent's attorney had precluded the possibility of good faith bargaining and excused the Respondent from normal bargaining requirements prior to implementation of its proposals on June 20. See, e.g., *Louisiana Dock Co*., 293 NLRB 233, 235–236 (1989).

[1] On September 28, 1995, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent, General Counsel, and Charging Party each filed exceptions and a supporting brief. The Respondent and the General Counsel filed answering briefs. The Charging Party filed a reply brief.

[2] There are no exceptions to the judge's finding that the Respondent did not unlawfully give unlawful assistance to the solicitation of employee resignations from the Union.

[3] All subsequent dates are in 1994, unless otherwise stated.

The judge further found, however, based on statements in the early June correspondence and by Grywalski on June 17, that the Respondent had unlawfully withdrawn recognition from the Union. He also found that this 8(a)(5) violation was a contributing cause of the June 20 strike.[4] Consequently, the judge defined the strike as an unfair labor practice strike from its inception, so the strikers were entitled to immediate reinstatement upon their September 12 unconditional offer to return to work. By refusing to offer reinstatement to two strikers and by delaying until January 25 and April 11, 1995, to offer the remaining strikers reinstatement, the Respondent violated Section 8(a)(3). Based on the judge's finding that the Respondent lawfully implemented new terms of employment on June 20, however, he found that reinstatement offers, when finally made, were valid.[5]

For the reasons set forth in the judge's decision, a majority of the panel (Chairman Gould and Member Fox) finds that the Respondent recognized the Union as the exclusive representative of unit employees under Section 9(a) of the Act and that the Respondent unlawfully withdrew recognition of the Union's 9(a) status in violation of Section 8(a)(5). For the reasons set forth in their separate opinions, a majority of the panel (Chairman Gould and Member Hurtgen) further agrees with the judge that the Respondent did not violate Section 8(a)(5) by unilateral changes or by direct dealing with unit employees.

ORDER[6]

The National Labor Relations Board orders that the Respondent, New Brunswick General Sheet Metal Works, Highland Park, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, working conditions, and other terms and conditions of employment.

(b) Refusing to reinstate unfair labor practice strikers to their former, or substantially equivalent positions, of employment.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit, and, upon request, embody in a signed agreement any understanding reached. The appropriate unit is:

> The employees of Respondent who are engaged in the manufacture, fabrication, and assembly of sheet metal, as described in Section 1 of the collective-bargaining agreement between the Union and the Association, effective June 1, 1991 through May 31, 1994.

(b) Within 14 days from the date of this Order, offer Ronald Belloff and Arthur Nelson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole Ronald Belloff, Arthur Nelson, Albert Previte, Dennis Bardsley, Norman Young, Rocco Metaldo, Norbert Siedentop, and Joseph McHose for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Highland Park, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 16, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

[4] In adopting this finding, we rely on undisputed evidence that employees received copies of the June 8 letter from the Respondent's president to the Union during the employee meeting conducted by Grywalski 3 days before the strike.

[5] In exceptions and in a motion for reconsideration, the Respondent challenges the judge's finding that the evidence is insufficient to show that it made offers of reinstatement to two former strikers. We deny the motion, but note that the Respondent has raised a remedial issue that can be litigated and resolved in the compliance stage of this proceeding.

[6] We shall modify several provisions of the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations as to which no violations have been found are dismissed.

CHAIRMAN GOULD, concurring.

Contrary to Member Fox, I agree with the administrative law judge's dismissal of the 8(a)(5) unilateral change and direct-dealing allegations. The Respondent's unlawful declaration that it was withdrawing recognition of the Union, even though it preceded the actual implementation of unilateral changes, had no impact on the parties' negotiations. The Union's bad-faith refusal to permit the Respondent to choose a member of its own bargaining team had already created and sustained what the Union itself declared to be a deadlock in bargaining. Furthermore, the Respondent remained willing to negotiate with the Union, albeit in the context of a perceived voluntary 8(f) relationship rather than under the statutory mandate of Section 8(d) and Section 9(a).

Finally, I agree with the judge that Grywalski's meeting with employees on June 17 cannot reasonably be described as direct dealing. Union Steward Previte requested the meeting and defined its purpose. Union Business Representative Kohler voiced no objection to Previte's proposal. Previte attended the meeting. In sum, the meeting took place with the full participation and approval of the Union.

MEMBER HURTGEN, dissenting in part.

I would dismiss the complaint in its entirety.

My colleagues conclude that the 1991 agreement between the Respondent and the Union establishes 9(a) status. I conclude that the agreement does not establish 9(a) status. Accordingly, the Respondent was privileged to withdraw recognition after the expiration of that contract, and to make unilateral changes. It follows that the strike to protest this conduct was not an unfair labor practice strike.

With respect to the issue of 9(a) vs. 8(f) status, I have set forth my views on this matter in *Oklahoma Installation*, 325 NLRB 741 (1998). In the instant case, as in the cited case, there is no showing that the Union had majority status at any relevant time, i.e., at the time of the 1991 contract or at the time of alleged recognition in 1988. Nor does the contract clearly state that there was such a showing. In this latter regard, the contract says that the Union "represents" a majority. However, "representation" is as true of 8(f) relationships as it is of 9(a) relationships. Similarly, although the contract speaks of "proof," it fails to say what was proved, i.e., it fails to say that the Union proved that it had been chosen by a majority of the employees. Finally, the contract says that the Union is the "exclusive" representative. However, "exclusivity" is as true of 8(f) relationships as it is of 9(a) relationships.

Concededly, the instant contract may be subject to a construction that 9(a) status was intended and that majority status was shown. However, for the reasons set forth in *Oklahoma Installation*, I would require clarity of language. At least in the absence of such clarity, I would entertain evidence as to whether there was in fact a demonstration of majority status. There is no such evidence here. Indeed, the Respondent sought to show the opposite, i.e., that there was no majority status. The Respondent was not permitted to show this.

In sum, there is no showing of a 9(a) relationship. Absent such a showing, there is no violation.

MEMBER FOX, dissenting in part.

I agree with the judge's findings that: (1) the Union was the 9(a) representative of the unit employees; (2) the Respondent's June 1994[1] unlawful withdrawal of recognition from the Union was a contributing cause of the strike which began on June 20, thereby rendering the work stoppage an unfair labor practice strike; and (3) the Respondent unlawfully refused to reinstate the strikers immediately upon their unconditional offer to return to work. I disagree, however, with my colleagues' adoption of the judge's finding that the Respondent did not breach its bargaining obligation by meeting directly with unit employees and by unilaterally implementing changes in unit employees' wages and benefits. I find that these actions not only violate Section 8(a)(5), but that they also render invalid the Respondent's offers of reinstatement to the former strikers.

As stated above, the judge found that the Respondent unlawfully withdrew recognition from the Union. In reaching this finding, he relied upon a June 8 letter from the Respondent's counsel to the Union asserting that "there is no longer a collective bargaining relationship in existence," as well as a June 17 statement from the Respondent's president to a shop steward that he no longer considered the company "in the Union." The judge determined that the Respondent's 8(a)(5) conduct was a contributing cause of the ensuing strike and that the strike therefore was an unfair labor practice strike from its inception.

As the judge and my colleagues acknowledge, the Union's insistence that the Respondent attend negotiation sessions without its attorney did not extinguish the Union's status as the employees' 9(a) representative, and therefore does not justify or render lawful the Respondent's withdrawal of recognition from the Union. Similiarly, the Union's conduct does not justify the Respondent's unilateral actions subsequent to the withdrawal of recognition, which followed from the unlawful withdrawal and were expressly undertaken in derogation of the collective-bargaining process and the Union's status as bargaining representative. I do not dispute that under settled law, once it was clear that the Union was refusing

[1] Dates refer to 1994 unless noted otherwise.

to meet unless the Respondent excluded its lawyer, who was one of its selected bargaining representatives, from the negotiations, the Respondent would have been free to declare an impasse in the negotiations, implement its final offer, and advise the employees of what it was doing. See *Louisiana Dock Co*., 293 NLRB 233, 235–236 (1989), enfd. in relevant part 909 F.2d 281, 286–287 (7th Cir. 1990) (employer acted lawfully in implementing final offer and announcing it to employees, where union had conditioned its agreement to negotiations on bargaining in a unit other than the recognized unit); *General Drivers & Helpers Local 554 v. Young & Hay Transportation Co*., 522 F.2d 562, 566–567 (8th Cir. 1975), affg. 214 NLRB 252 (1974) (same). But the Respondent did not follow this lawful course, which would have required that it continue to recognize the Union and remain ready to resume bargaining should the Union drop its demand that the Respondent's lawyer be excluded. Instead, the Respondent first withdrew recognition from the Union and then announced its unilateral changes to employees at a meeting at which it gave them copies of its letter to the Union stating that "there is no longer a collective-bargaining relationship in existence" and advised them that if they came to work the following Monday under the new wage rates they would be "out of the Union." The implementation of the new terms was thus intertwined with, and fatally tainted by, the Respondent's unlawful withdrawal of recognition.[2] See *Central Metallic Casket Co.,* 91 NLRB 572, 572–575 & fn. 13 (1950). (even assuming valid impasse had been reached, employer's unilateral implementation of proposed wage plan violated Sec. 8(a)(5) where, on account of employer's conduct in disparagement of union's role, implementation "necessarily represented" to employees that employer no longer recognized union's right to represent them).

"[A] bargaining impasse does not relieve an employer from the continuing duty to take no action which the employees may interpret as a 'disparagement of the collective bargaining process' or which amounts in fact to a withdrawal of recognition of the union's representative status or to an undermining of its authority." *Central Metallic Casket Co*., 91 NLRB at 573, quoting *NLRB v. Crompton-Highland Mills, Inc.,* 337 U.S. 217, 224 (1949). In my view, it is clear that both the announcement to the employees about the implementation and the implementation itself violated Section 8(a)(5). Accordingly, I would also find that the Respondent's offers of reinstatement to former strikers during January and April 1995 at the unlawfully implemented rates were not offers of full reinstatement to which the employees were entitled, and that the Respondent has therefore also violated Section 8(a)(3). See *Brooks, Inc*., 228 NLRB 1365, 1368 (1977).

[2] Contrary to Chairman Gould, I view the fact that the Respondent may have been willing, on a "voluntary" basis, to negotiate with the Union for an 8(f) agreement, as beside the point. The Respondent's statutory obligation was to continue to recognize and bargain with the Union as the exclusive 9(a) representative of its employees. In contrast to its obligations when dealing with a 9(a) representative, an employer which engages in bargaining with a union for an 8(f) agreement is not recognizing the union as the majority representative of its employees and retains the unilateral right to terminate the negotiations at any tme. I know of no authority that suggests that an employer can unlawfully withdraw recognition from its employees' 9(a) representative and nevertheless be found to be engaged in good-faith bargaining because it has offered to bargain with the representative on an 8(f) basis.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with Sheet Metal Workers International Association, Local Union 27 as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, working conditions, and other terms and conditions of employment.

WE WILL NOT refuse to reinstate former unfair labor practice strikers to their former, or substantially equivalent, positions of employment.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you under Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively with the Union as the exclusive representative of the employees in the following appropriate unit, and, on request, embody in a signed agreement any understanding reached. The appropriate unit is:

> Our employees who are engaged in the manufacture, fabrication and assembly of sheet metal, as described in Section 1 of the collective-bargaining agreement between the Union and the Association, effective June 1, 1991 through May 31, 1994.

WE WILL, within 14 days from the date of the Board's Order, offer Ronald Belloff and Arthur Nelson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without

prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Belloff, Arthur Nelson, Albert Previte, Dennis Bardsley, Norman Young, Rocco Metaldo, Norbert Siedentop, and Joseph McHose whole for any loss of earnings and other benefits resulting from our failure to reinstate them, less any net interim earnings, plus interest.

NEW BRUNSWICK GENERAL SHEET METAL WORKS

Richard E. Fox, Esq., for the General Counsel.
John A. Craner, Esq. (Craner, Nelson, Satkin & Scheer), of Scotch Plains, New Jersey, for the Respondent.
Robert F. O'Brien, Esq. (Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby & Graziano), of Haddonfield, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey, on June 7 and 8, 1995. Upon charges filed on June 16 and October 12, 1994,[1] a consolidated complaint was issued on November 4, alleging that New Brunswick General Sheet Metal Works (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on July 28, 1995.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Highland Park, New Jersey, has been engaged in the manufacture of sheet metal. It has been admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find, that Sheet Metal Workers International Association, Local Union 27 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The issues in this proceeding are:

1. Is the Union the exclusive collective-bargaining representative of the unit employees, pursuant to Section 9(a) of the Act?
2. Did Respondent fail to bargain with the Union and unlawfully withdraw recognition?
3. Did Respondent bypass the Union, deal directly with the unit employees and make unlawful unilateral changes?
4. Did Respondent solicit employees to withdraw from the Union by rendering unlawful assistance to them?
5. Did Respondent unlawfully fail to reinstate striking employees?

B. The Facts

1. Section 9(a) relationship

On October 1, 1991, Respondent's president, John J. Grywalski, signed an agreement binding Respondent to the terms and conditions of the collective-bargaining agreement between the Union and Sheet Metal Contractors Association of Central & Southern New Jersey and Associated Roofers (the Association). Article XXV of the collective-bargaining agreement states that:

> Inasmuch as the Union has submitted proof and the employer is satisfied that the Union represents a majority of its employees in the bargaining unit described herein, the employer recognizes the Union as the exclusive collective bargaining agent for all employees within that bargaining unit, on all present and future jobsites within the jurisdiction of the Union, unless and until such time as the Union loses its status as the employees' exclusive representative as a result of an NLRB election requested by the employees. The employer agrees that it will not request an NLRB election and expressly waives any right it may have to do so.

In *Hayman Electric*, 314 NLRB 879, 884 (1994), the Board stated:

> [S]ince *Deklewa*[2] the Board has stated that a party can prove the existence of a 9(a) relationship either through a Board-conducted representation election, or a union's express demand for, and an employer's voluntary grant of, recognition to the union based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.

Respondent argues that an 8(f) relationship existed and that the Union never became a 9(a) representative. Citing *J & R Tile*, 291 NLRB 1034, 1036 (1988), Respondent argues that there must be evidence that the Union unequivocally demanded recognition as the employees' 9(a) representative and that the employer unequivocally accepted it as such, before a 9(a) relationship is established.

The parties stipulated that article XXV first appeared in the 1988 agreement. Respondent attempted to adduce evidence concerning the negotiations leading up to the 1988 agreement, whether a demand for recognition was made by the Union at that time and whether Respondent was furnished with proof of majority status. Citing *Hayman Electric*, supra, General Counsel and counsel for the Charging Party strenuously objected to the receipt of such evidence arguing that it was time barred. I sustained counsel's objections.

Article XXV, which first appeared in the 1988 collective-bargaining agreement, states, in pertinent part, that "Inasmuch as the Union has submitted proof and the employer is satisfied that the Union represents a majority of its employees . . . the employer recognizes the Union as the exclusive collective-bargaining agent." Seven years after entering into that agree-

[1] All dates refer to 1994 unless otherwise specified.

[2] *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988).

ment, Respondent urges that I should have permitted evidence concerning whether, in fact, in 1988 the Union represented a majority of its employees in the bargaining unit. In this connection, in *Casale Industries*, 311 NLRB 951, 953 (1993), the Board stated:

> [T]he challenge to majority status came 6 years after Section 9 recognition was extended and accepted. The parties reached agreement on three successive contracts during that period. The issue before us is whether to permit a challenge to majority status after 6 years of stability in a multiemployer relationship.
>
> We will not permit the challenge. Our conclusion . . . is based on the proposition that a challenge to majority status must be made within a reasonable period of time after Section 9 recognition is granted. . . .
>
> . . . .
>
> These same principles would be applicable in the construction industry. In *Deklewa*, the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in nonconstruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition. [Fns. omitted.]

See also *Hayman Electric*, supra, 314 NLRB at 885–886.

It has been admitted that the Association and the Union entered into a collective-bargaining agreement effective from June 1, 1991, through May 31, 1994. On October 1, 1991, Grywalski signed an agreement stating: "I, the undersigned responsible officer for the below company hereby agree to the terms and conditions" of the Association collective-bargaining agreement. As mentioned above, article XXV of the collective-bargaining agreement acknowledges that the Union has submitted proof that it represents a majority of the employees in the bargaining unit and that the employer recognizes the Union as the exclusive collective-bargaining agent for the unit employees. Pursuant to *Casale Industries*, supra, and *Hayman Electric*, supra, I conclude that Respondent is barred from challenging the Union's majority status, and, I find, that at all times material herein, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit, pursuant to Section 9(a) of the Act.

2. Failure to bargain

The Association agreement was due to expire on May 31. Thomas Kohler, the Union's business representative, testified that on March 30 he met with Grywalski, and the Union and Respondent "exchanged proposals." Grywalski, who appeared to me to be a credible witness, also testified that both sides exchanged proposals. Grywalski testified that soon after the March 30 meeting he contacted Kohler. Kohler told him that the Union was negotiating with the Association and "wanted to get a lot of details worked out . . . and then they would get back to me." The next communication took place on May 26, when Kohler wrote Grywalski to "please be advised that I would like to request a second meeting on Friday, May 27, 1994 at 1:00 p.m. for the purpose of negotiating a new agreement." In response to the letter, Grywalski contacted Kohler, and credibly testified:

> I asked him what the procedure was. . . . The first meeting we had was at my shop between myself and Tom Kohler. But the second meeting they wanted to have that at the union hall. Tom Kohler explained to me that how he would go about is there would be two people from the union, probably himself and Tom Stapleton. So I said what do I do. He said, well you bring somebody with you. So I said okay. I'll bring a labor attorney with me, John Craner. And he said I'll have to get back to you.
>
> Q. Did he subsequently call you back?
>
> A. I believe he did . . . .
>
> Q. What was his response about your having me with you at the meeting?
>
> A. No labor attorney.

On May 27 Kohler sent another letter to Grywalski, which stated, "As per our telephone conversation Thursday, May 26, 1994, you expressed to me that the meeting time was unacceptable due to scheduling conflicts. Please be advised that I would like to request a second meeting, Tuesday, May 31, at 1 p.m., for the purpose of negotiating a new agreement. The meeting will take place at the Local 27 Union hall." Grywalski again called Kohler, and credibly testified:

> Q. . . . Did you call him back and talk to him about that meeting on the 31st?
>
> A. Yes. We tried to set up the meeting so that you would be available, which I believe you were available, I would be available, so we'd be able to go down to the meeting.
>
> Q. And what was his response?
>
> A. No labor attorney.
>
> Q. . . . Did he say if he was willing to meet; if he and Stapleton were willing to meet with you without a lawyer?
>
> A. Oh yes.
>
> Q. What did he say specifically about your meeting with them with a lawyer?
>
> A. That we wouldn't meet.

On June 6 Craner sent a letter to Stapleton, president of the Union, detailing Respondent's proposals. The letter stated "my client and I are prepared to meet with representatives of Local 27 at any reasonable time and place to discuss these proposals." On June 7, Stapleton wrote to Grywalski, as follows:

> Your previous demands of having an attorney present during negotiations are not a situation I wish to get into. This has never been a practice here before, and I don't want to start at the eleventh hour of negotiations. You have also refused to discuss any of the Union demands offered for consideration. Therefore, I am informing you that I now consider negotiations at deadlock. Our office will prepare the necessary paperwork for a submission to the National Joint Adjustment Board, to be scheduled for a hearing in July.

On June 8 Craner sent a letter to Stapleton which stated, in pertinent part:

> You recently wrote a letter to my client, dated June 7, 1994, in which you make it clear that you do not want to negotiate with my client with myself present. That is your choice and if you do not want to negotiate any further . . . I

> think you should make it clear to either my client or myself that that is the case, at which point I will advise my client to unilaterally implement the proposal forwarded to you on June 6, 1994.

Stapleton testified that soon thereafter he "exercised at the time what I thought was the proper thing to do and filed a National Joint Adjustment Board set of paperwork to have the contract sent out there." Stapleton testified that he specifically relied on section 8(A) of the collective-bargaining agreement, which states, in pertinent part:

> Should the negotiations for a renewal of this agreement or negotiations regarding a wage/fringe reopener become deadlocked in the opinion of the Union representative(s) or of the employer(s) representative(s), or both, notice to that effect shall be given to the National Joint Adjustment Board.

The complaint alleges that since June 1 Respondent has failed to bargain with the Union. Indeed, Charging Party's brief states, "New Brunswick's refusal to negotiate in good faith is evidenced in part by their insistence on the presence of counsel during negotiations." I find that General Counsel has not proven that Respondent has failed to bargain with the Union and no showing has been made that Respondent refused to negotiate in good faith. The record is clear that Grywalski requested that John Craner, Respondent's attorney, be present at the negotiations. The Union refused this request. I credit Grywalski's testimony that Kohler told him that the Union would be willing to meet with him without a lawyer, but that it would not meet with Respondent's attorney present. Stapleton's letter to Grywalski of June 7 substantiates this testimony. As stated in *88 Transit Lines*, 300 NLRB 177, 178 (1990), Respondent's president "had every right to choose who would be on its negotiating committee just as the Union selected its own committee." Respondent had the right to have its attorney, John Craner, present at the negotiations. The parties exchanged proposals and at no time did Respondent state that it refused to meet with the Union. Its only request was that the negotiations be conducted with its attorney present. This the Union refused. I find that General Counsel has not proven that Respondent failed to bargain with the Union and no showing has been made that Respondent refused to negotiate in good faith. See *Louisiana Dock Co*., 293 NLRB 233, 235–236 (1989), enf. denied on other ground 909 F.2d 281 (7th Cir. 1990).

3. Bypassing the Union and unilateral changes

Albert Previte appeared to me to be a credible witness. He was the union shop steward at Respondent's facility. He testified that on June l7 he and Kohler met with Grywalski. Grywalski showed Previte and Kohler several letters, including the June 6 letter from Craner to Stapleton. This letter contained Respondent's wage and benefit proposals. Grywalski told them that the new wage rates and benefits would be implemented the following Monday morning. Previte told Grywalski that he would like to have a meeting with the employees to tell them of the new arrangement. Previte contacted the employees and a meeting took place later that morning. Grywalski advised the employees of the new wage rate that would go into effect the following Monday morning. Previte testified that Kohler did not object to the employees having a meeting with Grywalski. Similarly, Kohler testified that he did not object to there being a meeting or to Grywalski speaking with the employees. Kohler also testified that he was never told that he could not be present at that meeting.

On June 20 Respondent implemented the changes in wages and benefits that it had proposed to the Union. The complaint alleges that at its meeting on June 17, Respondent bypassed the Union and dealt directly with its employees by advising them of changes in the terms and conditions of their employment. The complaint also alleges that on June 20 Respondent unlawfully implemented changes in its wage rate and benefits.

In *Louisiana Dock Co*., supra, 293 NLRB at 235, the Board stated:

> As the Respondents did not act unlawfully in refusing to bargain over the unit insisted on by the Union, we find that the Respondents' unilateral implementation of previously proposed changes in job classifications, wage rates, benefit plans, attendance policies, and other matters...did not constitute a violation of Section 8(a)(5) and (1). The Union rejected the Respondents' offers to bargain, insisting on negotiating only in the multisite unit. Thus, as the Board noted in *Young & Hay Transportation Co*.,[3] "the Union cannot be heard to protest the Respondent's unilateral actions, insasmuch as it was the Union's own acts which foreclosed effective negotiations."

The Board further stated (id. at 236):

> In these circumstances, we also find that the Respondents' announcement to its employees of the implementation of the unilateral changes was not unlawful direct dealing. Faced with the Union's refusal to bargain, the Respondents had no choice but to correspond directly with their employees concerning these changes.

As noted above, I have found that Respondent was not negotiating in bad faith because it requested to have its attorney present at negotiations. To the contrary, the Union did not have the right to insist that Respondent's attorney not be present at the negotiations. As stated by the Board in *Young & Hay Transportation Co*., supra, 214 NLRB 253, "the Union cannot be heard to protest the Respondents' unilateral actions inasmuch as it was the Union's own acts which foreclosed effective negotiations." In addition, as stated in *Louisiana Dock Co*., supra, 293 NLRB at 236, "Respondents' announcement to its employees of the implementation of the unilateral changes was not unlawful direct dealing." Both Previte, the shop steward, and Kohler were told of the proposed changes and Previte requested that Grywalski inform the employees of the changes. Previte was present at the meeting when Grywalski informed the employees of the changes and Kohler did not object to that meeting taking place. Accordingly, the allegations that Respondent bypassed the Union and dealt directly with the employees on June 17 and unlawfully implemented the changes to the wage rate and benefits on June 20 are dismissed.

4. Unlawful assistance

The complaint alleges that on June 27 Grywalski solicited employees to withdraw from the Union by assisting these employees in the typing and faxing of their letters of resignation. The record shows that on June 27 George Davison and Randy Jogan submitted letters of resignation to the Union. Respondent's attorney conceded that "a secretary in the office typed up

[3] 214 NLRB 252 (1974), affd. 522 F.2d 562 (8th Cir. 1975).

their resignation letters and allowed the employees to fax them over to Local 27." No showing has been made that Grywalski or any supervisor was involved with the typing and faxing of the letters of resignation. Instead, the only evidence is the letter of Respondent's attorney which states that "a secretary" in the office typed the letters and allowed the employees to fax them to the Union. I find that no showing has been made that the secretary was a supervisor or an agent of Respondent "to warrant vicarious liability of Respondent" for her actions. See *Knogo Corp*., 265 NLRB 935, 936 (l982), enf. granted in part and denied in part, on other grounds, 727 F.2d 55 (2d Cir. 1984). Accordingly, the allegation is dismissed.

5. Withdrawal of recognition and failure to reinstate

The complaint alleges that Respondent unlawfully withdrew its recognition of the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit. In Craner's letter to Stapleton dated June 8, speaking on behalf of Respondent, the letter states "there is no longer a collective-bargaining relationship in existence." In addition, Previte credibly testified that in his meeting with Grywalski on June 17 Grywalski told him that he no longer considered himself in the Union. I have already found that a 9(a) relationship existed between Respondent and the Union. I conclude, therefore, that the statement by Respondent's attorney that there is "no longer a collective-bargaining relationship in existence" and the statement by Grywalski that he no longer considers himself in the Union constitute the unlawful withdrawal of recognition of the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit.

A strike by Respondent's employees commenced on June 20. The complaint alleges that the strike was caused by Respondent's unlawful labor practices. A strike will be considered to be an unfair labor practice strike if the record establishes that an unfair labor practice was a "contributing cause" of the strike. See *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989); *National Management Consultants*, 313 NLRB 405, 408 (1993). I have found that Respondent unlawfully withdrew recognition from the Union as the exclusive collective-bargaining representative prior to the commencement of the strike. I deem this to be a "contributing cause" of the strike and, accordingly, I find that the strike which began on June 20 was an unfair labor practice strike at its inception.

On September 12, Stapleton, by letter and telegram, wrote to Grywalski as follows:

> On behalf of all members of the bargaining unit represented by Local 27 who have been on strike, we wish to advise you that we hereby make unconditional application to return to work. Since these are unfair labor practice strikers, we would expect you to reemploy them immediately.

Grywalski did not respond. On September 20 Stapleton again wrote to Grywalski stating that "the Local removed our picket line after September 9 and I wrote you a letter indicating our wish to return to work." Again, there was no response from Respondent.

On January 25, 1995, Respondent sent a letter to Arthur Siedentop stating "I am pleased to offer you a position with New Brunswick General Sheet Metal Works as a mechanic, with a gross pay rate of $22.00 per hour." Similar letters were sent on sent on April 11, 1995, to Rocco Metaldo, Albert Previte, Dennis Bardsley, Norman Young, and Joseph McHose.[4]

I find that the Union on behalf of the striking employees made an unconditional offer for them to return to work on September 12. As was stated in *Airport Parking Management*, 264 NLRB 5, 11 (1982):

> It having been established that the employees were unfair labor practice strikers, it follows that Respondent was obligated to immediately reinstate the unfair labor practice strikers to their former positions of employment upon their unconditional offer to return to work, discharging, if necessary, any employees hired as replacements during the strike.

Since I have found the strikers in the instant proceeding to be unfair labor practice strikers, upon the receipt of the September 12 communication, Respondent had an obligation to immediately reinstate the employees to their former positions, discharging, if necessary, any replacements.

The General Counsel and the Charging Party argue that the offers of reinstatement on January 25 and April 11, 1995, were invalid because they specified that the wage rate would be $22 per hour. I have already found that the implementation of the $22 wage rate on June 20 was not unlawful. Accordingly, I find that Respondent's offers of reinstatement dated January 25 and April 11, 1995, were valid offers of reinstatement.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The employees of Respondent who are engaged in the manufacture, fabrication, and assembly of sheet metal, as described in section 1 of the collective-bargaining agreement between the Union and Sheet Metal Contractors Association of Central & Southern New Jersey, which was effective from June 1, 1991, through May 31, 1994, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
4. At all material times the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.
5. By withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit Respondent has violated Section 8(a)(1) and (5) of the Act.
6. The strike which commenced on June 20, 1994, was an unfair labor practice strike at its inception.
7. By failing and refusing to reinstate the unfair labor practice strikers upon their unconditional offers to return to work on September 12, 1994, Respondent violated Section 8(a)(1) and (3) of the Act.
8. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[4] The record does not contain copies of any offers of reinstatement to Ronald Belloff and Arthur Nelson. While Grywalski testified that he "believes" he sent them offers as well, I conclude that the evidence is insufficient to show that offers of reinstatement were made to Belloff and Nelson.

9. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully withdrawn recognition from the Union, I shall order Respondent to recognize and bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. I shall also order Respondent to offer Ronald Belloff and Arthur Nelson[5] immediate reinstatement to their former positions or, if such positions are no longer in existence, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements. Respondent shall be required to make whole all of the striking employees for any loss of earnings they may have suffered from September 12, 1994, until the date of Respondent's offers of reinstatement. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (l950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6]

[Recommended Order omitted from publication.]

[5] As noted above, I have found that valid offers of reinstatement were made to the other six striking employees.

[6] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C § 6621.